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No. _____

In the Supreme Court of the United States

SENADA NDREKA,

Petitioner,

v.

MICHAEL MUKASEY, UNITED STATES ATTORNEY GENERAL,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner, Senada Ndreka asks that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit, so that this Honorable Court may settle the definition of the term "Particular Social Group" under INA § 101(a)(42).

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CITATION TO OPINIONS BELOW

The decision of the United States Court of Appeals for the First Circuit, *Nedreka v. Mukasey*, Docket No., 07-2019, is attached to this petition as **Appendix A & B**. The agency opinion issued by the Board of Immigration Appeals, *In re Senada Ndreka*, No. A 98 166 821 (BIA June 06, 2007), is attached hereto as **Appendix C**. The decision of the Immigration Judge dated February 2, 2006 is attached hereto as **Appendix D**.

STATEMENT OF JURISDICTION

The Court of Appeals for the First Circuit entered its judgment denying the timely submitted petition for rehearing on May 14, 2008. The mandate was subsequently issued by the First Circuit on May 19, 2008. **Appendix A**. The Court of Appeals denied Mrs. Ndreka's timely petition for review of the decision of the Board of Immigration Appeals on March 14, 2008. The order denying review of the agency appeal is attached hereto as **Appendix B**. This Honorable Court's jurisdiction is hereby invoked pursuant to 28 U.S.C. §1254, as the decisions below served to deprive Mrs. Ndreka of her rights as granted under the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Central to the matter *sub judice* are the Fifth Amendment rights granted to aliens seeking relief from the Courts of the United States, which Amendment states, in pertinent part, that "No

person...shall be deprived of life, liberty, or property, without due process of law."

I. STATEMENT OF THE CASE

The gravamen of the instant petition lies in the Courts of Appeals' inconsistent use and treatment of gender as a social group for the purpose of a grant of asylum. Such inconsistency is evident in the Court of Appeals for the First Circuit's decision in the matter at bar, which decision is in contravention of its own precedent. The Court of Appeals' decision is therefore arbitrary, capricious, and a clear violation of Mrs. Ndreka's Fifth Amendment rights. The decision below also exposes Mrs. Ndreka to the likelihood of abduction and forced conscription into the sex trade if she is returned to Albania, a violation of the Eighth Amendment. A concise statement of the case's history and underlying facts is herein provided so as to set forth the grave repercussions of the decision below.

Petitioner appeared before the Honorable Francis L. Cramer for a hearing on the merits of her applications. On February 2, 2006, the IJ denied Petitioner's request for asylum pursuant to §208 of the Immigration and Nationality Act (hereinafter "INA"), withholding of removal pursuant to INA § 241(b)(3), and withholding of removal under Article III of the Convention Against Torture. *See* **Appendix D** Petitioner appealed the IJ's decision to the BIA. Through an order dated June 06, 2007, the BIA affirmed the IJ's opinion, thereby dismissing Petitioner's appeal. *See* **Appendix C**.

Petitioner subsequently appealed the BIA's decision to Court of Appeals for the First Circuit. Petitioner argued that she merited a grant of asylum as she qualified as a refugee within the meaning of Section 101(a)(42) of the Immigration and Naturalization Act. *See* INA §101(a)(42). On March 14, 2008, the Court of Appeals for the First Circuit denied Petitioner's appeal for review of the BIA's decision. *See* **Appendix B**. Petitioner then filed a Petition for Rehearing with the Court of Appeals for the First Circuit, which denied her Petition on May 19, 2008. *See* **Appendix A**.

II. SUMMARY OF THE ARGUMENT

Mrs. Ndreka hereby asserts that the Court of Appeals for the First Circuit, in contravention of its own precedent, violated her Fifth Amendment rights to due process of law by denying her Petitions for Review and Rehearing. Petitioner credibly testified as to repeated attempts at abduction on her person and submitted United States Department of State Country Reports for Albania detailing Albania's long, unchecked, well-documented history of human trafficking. Despite these factors the First Circuit departed from its own precedent and those of its sister circuits, in finding that she was not eligible for a grant of asylum as a member of a social group who possessed a well-founded fear or future persecution.

Further, as demonstrated below, the Circuit Courts have neither a consistent definition or test for determining who is considered a member of a "particular social group."

III. ARGUMENT IN SUPPORT OF PETITION

A. The First Circuit Court Of Appeals' Decision to Deny Petitioner a Grant Of Asylum Based on her Membership in a Particular Social Group is in Conflict with Other Circuits.

1. The Court of Appeals for the First Circuit Abrogated Petitioner's Rights by Denying her Claims for Asylum Despite Petitioner's Well-Founded Fear of Persecution Based on her Membership in a Particular Social Group.

This Court should review the decision of the First Circuit because Petitioner possesses a well founded fear that she will be abducted and sold into the sex trade if returned to Albania. To be eligible for a grant of asylum, an alien must first show that he or she is a "refugee" within the meaning of Section 101(a)(42) of the Immigration and Naturalization Act. *See* INA §101(a)(42). To make this showing, an alien must prove that he or she is either unable or unwilling to return to his or her country based upon past persecution suffered or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. *See Ramsameachire v. Ashcroft*, 357 F.3d 169, 178 (2d Cir. 2004).

"Persecution," as employed in the statute, has been defined by the Board of Immigration Appeals and generally accepted by the United States Circuit Courts

of Appeals as meaning "a threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded offensive." *See Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985); *Li v. Attorney General of the U.S.*, 400 F.3d 157 (3d Cir. 2005); *Montoya-Ulloa v. INS*, 79 F.3d 930 (9th Cir. 1996); *Guevara-Flores v. INS*, 786 F.2d 1242 (5th Cir. 1986).

For the harm or suffering to be considered persecution it must be inflicted either by the government or by persons or organizations the government is unable or unwilling to control. *Pavlova v. INS*, 441 F.3d 82, 91-92 (2d Cir. 2006) [Reversed IJ who required that applicant show persecution by the government despite her demonstrating that the Russian government was unwilling to control the RNU's religiously motivated persecution of Baptists]; *Fiadjoe v. Attorney General of the U.S.*, 411 F.3d 135, 160-63 (3d Cir. 2005) [Reversed BIA's denial of asylum in case involving woman who was sexually and emotionally abused by her father who was priest in Trokosi sect in Ghana where DOS country report indicated that it would have been futile for the applicant to go to police in regard to slave practices of Trokosi sect which are not prosecuted by the government].

"Membership in a particular social group as defined by the BIA refers to persons who hold an "immutable characteristic or common traits such as sex, color, kinship or in some cases shared past experiences such as land ownership or military service." *Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985). Under the BIA's definition, it must be a characteristic that the group cannot change or should not be required to

change because it is fundamental to their identities or consciences. In *Acosta*, 19 I&N Dec. 211 (BIA 1985), the BIA found that membership in a taxi collective that was being persecuted did not constitute "membership in a particular social group" because the applicant was free to quit the group.

The U.N. Handbook defines particular social group as persons with similar backgrounds, habits or social status. *See* Handbook at ¶77. The High Commissioner's Office has also published guidelines. Unlike the BIA's view these guidelines take into consideration external factors as well as internal/immutable characteristics in determining a social group. *Guidelines on International Protection: "Membership of a particular social group" within the context of Article 1A(s) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees,* U.N. Refugee Agency, U.N. Doc. HCR/GIP/02/02 (May 7, 2002). "A group of persons who share a common characteristic other than their risk of being persecuted, *or who are perceived as a group by society.* The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights." *Guidelines* at ¶11. In Acosta, 19 I. & N. Dec. 211, 233 (BIA 1985), overruled in part on other grounds by *In re Mogharrabi,* 19 I. & N. Dec. 439 (BIA 1987), the BIA listed gender as an example of a prototypical immutable characteristic that could form the basis for a social group.

This holding has been affirmed by numerous circuits. The Ninth Circuit Court of appeals made this

finding explicit in *Mohammed v. Gonzales*, 400 F.3d 785, 797 (9th Cir. 2005), saying:

> Although we have not previously expressly recognized females as a social group, the recognition that girls or women of a particular clan or nationality (or even in some circumstances females in general) may constitute a social group is simply a logical application of our law. We have held "that a 'particular social group' is one united by a voluntary association . . . *or* by an innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it." citing *Hernandez-Montiel* v. *INS*, 225 F.3d 1084, 1093 (9th Cir. 2000) (emphasis in original) (recognizing that persecution on account of homosexuality can constitute persecution on account of membership in a particular social group). Few would argue that sex or gender, combined with clan membership or nationality, is not an "innate characteristic," "fundamental to individual identity."

The First Circuit itself deferred to *Matter of Acosta*'s broad definition of "particular social group," stating; "[m]embership may stem from an innate characteristic or a shared experience Compare, e.g., *Gebremichael v. INS*, 10 F.3d 28, 36 (1st Cir. 1993)(concluding that family membership can constitute membership in a social group), with, e.g., *Mediouni v. INS*, 314 F.3d 24, 28 (1st Cir. 2002)(concluding that past employment as a police officer could satisfy the social group

membership requirement)." *Ang v. Gonzales*, 430 F.3d 50, 55 (1st Cir. 2005). While the First Circuit does not explicitly set out a test for defining such characteristics it states that "[i]n determining what constitutes persecution on account of membership in a particular social group, the key is whether the claimed persecution is aimed at an individual because of his or her affiliation with a group of persons, all of whom share a "common, immutable characteristic." *Da Silva v. Ashcroft*, 394 F.3d 1, 5 (1st Cir. 2005). This reasoning mirrors the standard more clearly explicated by the Second Circuit in *Gao v. Gonzales,* 440 F.3d 62, 68 (2d Cir. 2006). In *Gao* the Second Circuit stated that:

> "The reasoning in *Fatin* may be taken to suggest that the proper balance to strike is to interpret "particular social group" broadly (requiring only one or more shared characteristics that are either immutable or fundamental) while interpreting "on account of" strictly (such that an applicant must prove that these characteristics are a central reason why she has been, or may be, targeted for persecution)."

The Second Circuit further adds that their decision in *Gomez v. INS,* where in the Court wrote that "possession of broadly-based characteristics such as youth and gender will not by itself endow individuals with membership in a particular group" is not inconsistent with the Acosta definition of "particular social group". 947 F.2d 660, 664 (2d Cir. 1991). The Second Circuit explains that "*Gomez* can reasonably be read as limited to situations in which an applicant

fails to show a *risk* of future persecution on the basis of the "particular social group" claimed, rather than as setting an *a priori* rule for which social groups are cognizable." *Gao,* 440 F.3d at 70.

Thus, the Second Circuit Court of Appeals' test for a grant of withholding of removal or of asylum based upon membership in a social group, and by extension, that of the First Circuit is as follows:

> "The alien must (1) identify a group that constitutes a "particular social group" within the interpretation just discussed, (2) establish that he or she is a member of that group, and (3) show that he or she would be persecuted or has a well-founded fear of persecution based on that membership." Id. at 67 citing *Fatin*, 12 F.3d at 1240.

Accordingly, an alien's claim for asylum must necessarily be understood within the context of the current political situation existing in such alien's native country. *Cordero-Trejo v. INS*, 40 F.3d 482, 490-91 (1st Cir. 1994) (*reversed* BIA denial of asylum where testimony and evidence not considered "in light of general conditions" in country as required by 8 C.F.R. §208.13(a)). To this end, the Board of Immigration Appeals has taken a view to requiring the inclusion of general background information about the alien applicant's native country in the record of proceedings as a foundation for the alien's claim. *See also Gramatikov v. INS,* 128 F.3d 619, 620 (7th Cir. 1997) (*criticizing* uncorroborated claims about country conditions). The Board of Immigration Appeals has asserted its reliance on the Profile of Asylum Claims

and Country Conditions reports issued by the Department of State, which are prepared pursuant to 8 C.F.R. §§208.11(a), 1208.11(a), and the United States government's view of country conditions in specific countries, and frequently regards the findings set forth in such reports as dispositive of issues pertaining to country conditions within the context of asylum/removal proceedings. *Matter of R-S-H- et al.*, 23 I&N Dec. 629, 643 (BIA 2003) (In a case involving Lebanon the Board of Immigration Appeals emphasized that the Immigration Judges and the Board frequently rely on Department of State Country Reports); *Matter of A-E-M-*, 21 I&N Dec. 1157 (BIA 1998) (*denying* asylum based on a finding of no evidence of country wide persecution pursuant to a Department of State profile for Peru stating that Sendero Luminosa has reduced ability to act and operate in only in only a few areas of Peru); *Matter of V-T-S-*, 21 I&N Dec. 792, 798-799 (BIA 1997) ("Country condition profiles described by the State Department have been found to be 'the most appropriate and perhaps best resource for information on conditions in foreign nations.'")

In keeping, the First Circuit requires that even if an petitioning alien is in fact a member of a particular social group, in order to qualify for asylum under INA §101(a)(42), he or she must demonstrate a well-founded fear of persecution. *Da Silva* 394 F.3d at 6 This is the same test the Second Circuit applied in Gao to determine if she was a member of a social group under the auspices of INA §101(a)(42):

> "Gao belongs to a particular social group that shares more than a common gender. Gao's social

> group consists of women who have been sold into marriage (whether or not that marriage has yet taken place) and who live in a part of China where forced marriages are considered valid and enforceable... Moreover, Gao's testimony, which the IJ credited, also establishes that she might well be persecuted in China-in the form of lifelong, involuntary marriage-" on account of "her membership in this group." *Gao* 440 F.3d at 71

As the Second Circuit did not find evidence in the record demonstrating that the government was both willing and able to protect Gao, or that she could safely relocate within the country, the Court found that she possessed a well-founded fear of persecution and the denial of the BIA erroneous.

Likewise, in the instant matter, Petitioner asserts that she is eligible for a grant of asylum under the auspices of INA §101(a)(42) and that the denial of the First Circuit was in error and contrary to precedent. Petitioner alleges that she meets all three prongs of the *Gao* test.

First, Petitioner is a member of a particular social group, which possesses "immutable characteristic or common trait such as sex, color, kinship or in some cases shared past experiences", namely, young, attractive women in Albania, who have been targeted for abduction and sale. Matter of Acosta, however, does recognize that certain past experiences form the basis for protected group status under the asylum statute, and other BIA precedents have recognized such protection for some experiential-based groups

offered by asylum seekers. See, e.g., *Matter of Fuentes*, 19 I. & N. Dec. 658, 662 (BIA 1988); *In re Fauziya Kasinga*, 21 I. & N. Dec. 357 (1996). *Hong Hong v. AG of the United States*, 165 Fed. Appx. 995, 1002 (3d Cir. 2006).

Second, Petitioner asserts that she has established her membership in this group, as her gender and nationality are clear, and she testified credibly (the immigration judge made no adverse credibility finding) about the two attempted abductions. Thirdly, Petitioner maintains that she has a well-founded fear of returning to Albania as it is likely that she will suffer a third attempt at abduction on her person. To support such a fear Petitioner points to the fact that she submitted credible documentary evidence in the form of U.S. Department of State Country Reports for Albania detailing Albania's long history of human trafficking and the government's inability to stem the tide. She also highlights the fact that, even after one unsuccessful attempt, her persecutors remained interested in capturing her and made a subsequent attempt.

Accordingly, given the Petitioner's satisfaction of the *Gao's* three prong test and the inability of the Albanian government to protect people such as Mrs. Ndreka, either via relocation within Albania or by police action, The Court of Appeals for the First Circuit erred in denying Petitioner's petition for review.

2. The Federal Circuit Courts of Appeals are not in Agreement as to the Elements Required to Establish Membership in a Particular Social Group within the Meaning of Section 101(a)(42) of the Immigration and Naturalization Act, Thus Presenting a Federal Question Reviewable by this Honorable Court.

The Circuit Courts of Appeal are sharply divided as to what approach to take regarding evaluating whether a potential refugee or asylee is in fact a member or a particular social group. As the Third Circuit said in *Hong*:

> "This statutory language itself is "not very instructive: Read in its broadest literal sense, the phrase is almost completely open-ended. Virtually any set including more than one person could be described as a "particular social group. There is no helpful evidence of legislative intent and "both courts and commentators have struggled to define" the phrase. Thus, the "contours of what constitutes a 'particular *social group*' are difficult to discern." *See also* 3 Charles Gordon, Stanley Mailman & Stephen Yale-Loehr, *Immigration Law and Procedure* § 33.04(2)(d)(i) (rev. ed. 2005) ("Its scope has been debated, thus far inconclusively . . . . A clearer picture doubtless will be developed in case-by-case litigation."). Hong Hong v. AG of the United States, 165 Fed. Appx. 995, 997 (3d Cir. 2006). (internal citations omitted).

The First, Third, and Seventh Circuits have adopted the BIA's "immutable characteristic" approach while recognizing that there are variations in the standard in different circuits. *See, e.g., Lukwago v. Ashcroft,* 329 F.3d 157, 170-73 (3d Cir. 2003) [Adopting *Acosta* approach]; *Lwin v. INS,* 144 F.3d 505, 510-13 (7th Cir. 1998) [Same]; *Alvarez-Flores v. INS,* 909 F.2d 1, 7 (1st Cir. 1990). *See also Da Silva v. Ashcroft,* 394 F.3d 1, 4-6 (1st Cir. 2005) [Adhering to immutability whether innate or experiential as a requirement but recognizing that refugees situations "vary widely" in whistleblower case and accepting "that current or former employment status can, at least theoretically, form the linchpin for assembling a protected social group"]; *See also Ang v. Gonzales,* 430 F.3d 50, 55-56 (1st Cir. 2005) [Finding that employment at the U.S. Embassy or support for Americans can constitute social group membership because membership may stem from an "innate characteristic or shared experience"]; *but see Ahmed v. Ashcroft,* 348 F.3d 611, 6116-18 (7th Cir. 2003) [Finding in the context of a police officer who left his position that "immutability, while important, has never been the last or only word on the definition of a social group"].

The Sixth Circuit has adopted the BIA's immutable characteristic approach under *Chevron* deference standards but recognized that the BIA itself in such cases as *Matter of R-A-,* 22 I&N Dec. 906 (BIA 1999) (now withdrawn and remanded by AG to the BIA in light of future regulations, 23 I&N Dec. 694) may be moving toward recognizing external perception of a group as a factor. "In other words, society's reaction to a 'group may provide evidence in a specific case that a particular group exists, as long as the reaction by

persecutors to members of a particular social group is not the touchstone defining the group." *Castellano-Chacon v. INS*, 341 F.3d 533, 548 (6th Cir. 2003).

The Eighth and Ninth Circuits have defined a particular social group as one "in which the members are 'united by a voluntary association *or* by an innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it.'" *Tchoukhrova v. Gonzales*, 404 F.3d 1181, 1188 (9th Cir. 2005) [Disabled children and their parents who provide care for them are a social group]; *Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000). *Safaie v. INS*, 25 F.3d 636, 640 (8th Cir. 1994) [Although all Iranian women could not be a social group, Iranian women who advocate women's rights could be]. As demonstrated above, Second Circuit has adopted the "voluntary associational relationship" standard as well, but, noted that the members of a social group must be externally distinguishable. *Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991); *Saleh v. DOJ*, 962 F.2d 234, 240 (2d Cir. 1992). *See also Gao v. Gonzales*, 440 F.3d 62, 66-70 (2d Cir. 2006) [Relying on a broad interpretation of *Matter of Acosta*, distinguishing *Gomez*, and finding that women subject to forced marriage in China is a social group].

In Sanchez-Trujillo, 801 F.2d 1571, 1574-75 (9th Cir. 1986), the court recognized four criteria for establishing social group persecution: (1) Is the group cognizable? (2) Does the alien qualify as member? (3) Has the group been targeted because of characteristics as a group? (4) Are "special circumstances" present which permit *per se* finding and which do not require

findings of individual persecution of members of group?

Similarly the Sixth Circuit has also noted that a social group may not be defined by the fact that the individuals suffer persecution but rather share a "narrowing characteristic other than their risk of being persecuted." *Rreshpja v. Gonzales,* 420 F.3d 551, 556 (6th Cir. 2005) [Young Albanian women who are forced into prostitution is not a social group].

In *Lwin v. INS,* 144 F.3d 505, 510 (7th Cir. 1998), however, the Court adopted the first two criteria above and instead maintained as a third that the person establish that his well-founded fear is based on his membership in the group. This test is the one explicated by the Second Circuit in *Gao*.

The Tenth Circuit, departing from the multi-prong tests of its sister circuit, maintains fidelity to the Board's definition in *Matter of Acosta,* stating; "[w]e are not persuaded that the BIA, contrary to the language of *Acosta*, requires more than gender plus tribal membership to identify a social group." *Niang v. Gonzales,* 422 F.3d 1187, 1198-2001 (10th Cir. 2005) [Female member of the Tukulor Fulani tribe in Senegal that practices FGM can be subject to persecution on account of membership in a particular social group because gender and tribal membership are immutable characteristics]. The Tenth Circuit therefore, simply defines a particular social group as, "common characteristics that members of the group either cannot change, or should not be required to change because such characteristics are fundamental to their individual identities." *Niang* 422 F.3d at 1197.

With both the definition and evaluative process of determining a "particular social group" ambiguous, the Circuit Courts have engaged in speculation, resulting in nearly each circuit creating their own definition or test. Accordingly, this issue is ripe for review by the United States Supreme Court. Granting of Petitioner's writ would allow this Honorable Court to define a social group and solidify which is the proper method of evaluating whether an alien meets the criteria.

CONCLUSION

For the reasons set forth above, this Honorable Court should grant certiorari and schedule this matter for briefing and oral argument to ensure the opportunity for Mrs. Ndreka to have the merits of her meritorious appeal reviewed by the Court of Appeals for the First Circuit.

Respectfully submitted,

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